

Date Issued: April 30, 1998

In the Matter of

JOAN FRASER,
ADMINISTRATOR, WAGE AND HOUR DIVISION,
UNITED STATES DEPARTMENT OF LABOR,

Plaintiff,

v.

CORNFORTH-CAMPBELL MOTORS, INC.,	94-CLA-73
TACOMA DODGE, INC.,	94-CLA-80
BOWEN SCARFF FORD SALES, INC., d/b/a	
BOWEN SCARFF FORD/VOLVO,	94-CLA-83
BNS ENTERPRISES, INC., d/b/a ACURA OF BELLEVUE,	94-CLA-88
NORTH SEATTLE CHRYSLER PLYMOUTH, INC.,	94-CLA-91
TOTEM HILL PONTIAC GMC TRUCK, INC.,	94-CLA-93
WINNER LINCOLN-MERCURY, INC.,	94-CLA-95
ART GAMBLIN MOTORS, INC.,	94-CLA-97
BELLINGHAM CHRYSLER CENTER, INC.,	94-CLA-98
GOOD CHEVROLET, INC.,	94-CLA-99
CAPITOL MANAGEMENT & INVESTMENT CO., d/b/a	
CAPITOL COACHMAN,	94-CLA-100
EVERGREEN SPORTSCARS, INC., d/b/a EVERETT MAZDA,	94-CLA-101
BREWER CHRYSLER PLYMOUTH, INC.,	94-CLA-103
JIM FUGATE FORD, INC., d/b/a FUGATE FORD-MERCURY-MAZDA,	94-CLA-107
EVERED MOTORS, INC., d/b/a BELLEVUE LINCOLN, MERCURY,	94-CLA-108
JACKL INC., d/b/a HONDA OF KIRKLAND,	94-CLA-110
PRESTIGE FORD,	94-CLA-111
THOMASON AUTO GROUP NORTH, INC., d/b/a THOMASON	
FORD/TOYOTA OF KIRKLAND,	94-CLA-112
PIONEER FORD, INC.,	95-CLA-2
GREY CHEVROLET, INC.,	95-CLA-3
SOUND FORD, INC.,	96-CLA-7
S & K MOTORS, INC.,	96-CLA-8
SEVEN MOTORS CORPORATION,	96-CLA-9

Respondents.

APPEARANCES:

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For the plaintiff

Richard P. Lentini, Esquire
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For the respondents

BEFORE: DONALD W. MOSSER
Administrative Law Judge

DECISION AND ORDER

Plaintiff¹ in this consolidated action alleges the twenty-three respondents violated Section 12 of the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. §§ 201 *et seq.* (the Act) and the applicable regulations found in Part 570 of Title 29 of the Code of Federal Regulations. Specifically, the respondents were cited for violating the child labor provisions found in Section 12 of the Act by allowing minors under the age of eighteen years to engage in the hazardous occupation of driving on public roads. 29 U.S.C. §§ 203, 212; 29 C.F.R. § 570.52; (ALJX 1, 3, 5, 8, 9, 11, 13-24, 26, 27, 45-47.)² These actions arise from various Orders of Reference filed by an Associate Regional Solicitor for the United States Department of Labor.

After an investigation, the Wage and Hour Division of the Department of Labor assessed civil penalties against all but one respondent on March 18, 1994, and the remaining respondent on April 6, 1994. (ALJX 1, 3, 5, 8, 9, 11, 13-24, 26, 27, 37-39). Each respondent filed an exception to this assessment and requested a formal hearing. *Id.* On July 20, 1994, the respondents, with the exceptions of Pioneer Ford and Grey Chevrolet, joined other plaintiffs in filing a complaint in the United States District Court for the Western District of Washington against the Department of Labor asking that court, among other items, to nullify the penalties imposed and issue an injunction prohibiting the enforcement of the penalties and barring the administrative proceedings.

¹ Caption is corrected to name the Administrator, Wage and Hour Division as the plaintiff in accordance with 29 C.F.R. § 580.10.

² References to ALJX, PX, and RX refer to exhibits of the administrative law judge, plaintiff, and respondent, respectively. The transcript of the hearing is cited by "Tr." followed by a page number.

(PX 119). On September 9, 1994, the Solicitor's office of the Department of Labor issued the first Orders of Reference in the administrative proceeding and issued the remaining orders on September 23 and 27, 1994 and November 9, 1995. (ALJX 1, 3, 5, 8, 9, 11, 13-24, 26, 27, 37-39). The Solicitor's office filed a motion in the district court requesting the dismissal of the civil action on September 20, 1994. *Acura of Bellevue v. Reich*, 90 F.3d 1403, 1405 (9th Cir. 1996), *cert. denied* ___ U.S. ___, 117 S. Ct. 945, 136 L. Ed. 2d 834 (1997). Pursuant to a joint request from both parties, the Deputy Chief Judge of the Office of Administrative Law Judges issued a stay in this administrative proceeding while the case was before the district court. (ALJX 28, 29). He had earlier consolidated these cases for hearing. (ALJX 31, 48).

While the district court judge originally denied the Department of Labor's motion to dismiss, upon reconsideration, he granted it in March 1995. (ALJX 33). The respondents appealed that decision to the Court of Appeals for the Ninth Circuit on May 18, 1995. *Acura of Bellevue*, 90 F.3d at 1405. On September 1, 1995, the Deputy Chief Judge of the Office of Administrative Law Judges removed the stay in this administrative proceeding and later denied the respondents' request to issue a new stay while the case was pending before the appellate court. (ALJX 31, 33). The cases subsequently were assigned to me for the purposes of conducting a formal hearing and rendering a decision. (ALJX 49-53). In the interim, the Ninth Circuit upheld the decision of the district court dismissing the respondents' claim. *Acura of Bellevue*, 90 F.3d at 1409. Although the respondents filed a petition for certiorari to the United States Supreme Court, that Court denied the petition on February 18, 1997. *Acura of Bellevue v. Reich*, ___ U.S. ___, 117 S. Ct. 945, 136 L. Ed. 2d 834 (1997).

I held a hearing on these matters on June 9 and 10, 1997 at Seattle, Washington. (ALJX 54). Both parties were afforded the opportunity to present evidence and to file post-hearing briefs. The findings of fact and conclusions of law which follow are based on a thorough review of the evidentiary record in light of the arguments advanced by the parties.

ISSUES

The issues remaining to be decided in these cases are:

1. whether the driving performed by the minors for the respondents was "incidental and occasional" within the meaning of 29 C.F.R. § 570.52; and,
2. whether civil money penalties should be imposed on some or all of the respondents.

FINDINGS OF FACT

Respondents are automobile and truck dealerships doing business in the Puget Sound area in the western portion of the State of Washington. All of these dealerships are employers within

the meaning of the Fair Labor Standards Act and are subject to the child labor employment restrictions of the Act.

At the times pertinent to this proceeding, the respondents employed minors between 16 and 18 years of age.³ Some of these minors drove their employers' vehicles on public roads as a part of their jobs. None of the vehicles driven by these minors exceeded 6,000 pounds in gross weight and all were equipped with either a seatbelt or a similar restraining device. All of these minors had completed a driver's education class, held valid State driver's licenses and had been instructed by their employers that seatbelts or similar restraining devices must be used in driving on public roads. (Post-Hearing Brief of the Plaintiff at pp. 5-6). Most of the driving by these minors was restricted to daylight hours. (PX 10, 20; Tr. 169-70, 262).

Cornforth-Campbell Motors, Inc. (Cornforth) is an automobile and truck dealership doing business in Puyallup, Washington. (PX 4). For the year 1991, Cornforth had annual gross sales in excess of \$12,000,000 which increased to about \$13,500,000 in the following year. (PX 4, 5, 7, 8). This corporation employed eight minors between December 1, 1991 and November 30, 1993, four of whom were involved in driving Cornforth's vehicles on public roads as part of their jobs. (PX 8, 9). The employer classified three of these minors as lot attendants whose duties included washing cars and cleaning the shop. These minors also drove vehicles on public roads between Cornforth's lot and the body shop and to a local gasoline station. (PX 8). The dealership classified the fourth minor as a parts helper who assisted with parts supplies and cleaning the shop. (PX 5, 8). In this minor's six-week career with Cornforth, he drove on public roads to a parts store about one mile away. This driving normally occurred anywhere from once or twice per day to once a week. (PX 5, 8).

As the name implies, Tacoma Dodge, Inc. (Tacoma) is an automobile dealership located in Tacoma, Washington. This business produced gross sales in excess of \$30,000,000 in 1991 and \$36,000,000 in 1992. Tacoma employed one minor from December 1, 1993 to January 1, 1994. (PX 10). The minor worked in lot clean-up, spending most of his time washing cars and preparing them for customers. (PX 9, 13). This work included driving vehicles on the public roads to a gasoline station about one mile away. (PX 10, 13). This employee, who worked after school during the winter and on Saturdays, would drive to the gasoline station about twice a night. (PX 10; Tr. 169-70).

Bowen Scarff Ford Sales, Inc. (Bowen) is a Ford and Volvo dealership doing business in Kent, Washington. This corporation had gross sales in 1991 and 1992 in excess of \$44,000,000. During the times December 1, 1991 through November 30, 1993, Bowen had 120 employees, 16 of whom were minors. Bowen classified the jobs of six of these employees as service valets and two other minors as lot attendants. (PX 14, 16). The lot attendants' duties involved washing and preparing cars, cleaning the dealership premises, moving and parking cars on the premises and

³ Unless otherwise noted in this decision, references to "minors" pertain to respondents' employees who were either 16 or 17 years of age at the pertinent time.

miscellaneous duties. (PX 18). These two minors also drove Bowen's cars on public roads to a gasoline station, a wheel shop and other car lots. They also drove trucks on public roads to a truck center lot. (Tr. 75, 78; PX 15, 18). The gasoline station was located less than one-half mile from Bowen's dealership. (PX 18). The duties of the six minors classified as service valets included making parts runs and driving to a body shop on public roads, as well as driving a shuttle van to pick-up and drop-off customers. (PX 15). One of the lot attendants and two of the service valets were 16 years of age at the time they drove on public roads as a part of their employment with Bowen. (PX 14, 18).

BNS Enterprises, Inc. (BNS) operates a retail and wholesale Acura dealership in Bellevue, Washington. This corporation employed 56 persons during the times pertinent to this case and had annual gross sales in 1991 and 1992 in the area of \$30,000,000. (PX 19, 23). BNS employed five minors, two of whom were involved in driving on public roads for their employer, between October 1, 1991 and September 30, 1993. (PX 19). One minor worked as a wash and vacuum person in the service department, while the other served as a lot attendant. (PX 19). Although hired to wash and prepare cars, the lot attendant was also expected to provide courtesy transportation for customers, which involved driving them to home or work. (PX 20, 23; Tr. 261-62). This occurred about twice per week and on two occasions the driving was after dark. (PX 20; Tr. 262). The wash and vacuum person also transported customers on public roads and drove to pick up parts a few miles away from the dealership up to three times a day. (PX 20; Tr. 261). BNS expected the minors to provide customer transportation although not all of the minors employed did so and some did only on rare occasions. (PX 20; Tr. 262-63, 266).

Between October 1, 1991 and September 30, 1993, North Seattle Chrysler Plymouth, Inc. (North Seattle) employed three minors, one of whom was involved in driving on public roads. (PX 28). Part of this minor's duties as a detailer involved driving off North Seattle's lot for about 1-1/2 blocks to a gas station. (PX 24-26; Tr. 290-91). This dealership's annual gross sales between 1990 and 1992 was about \$25,000,000 each year and it employed about 50 persons. (PX 24).

Totem Hill Pontiac GMC Truck, Inc. (Totem Hill) commenced its automobile business in Kirkland, Washington in late 1990. Its annual gross sales were about \$9,000,000 in 1991, then doubled to a little over \$18,000,000 in the following year. Totem Hill employed 30 some persons during the times pertinent to this case, six of whom were minors. (PX 29, 31). Five of the minors were classified as lot persons who were required to drive their employer's vehicles off the lot on public roads on a regular basis to get gasoline or for other errands. (PX 29, 30, 33; Tr. 272-274, 276-77). One of the lot persons was 16 years of age while involved in driving on public roads for Totem Hill. (PX 29, 33). The sixth minor was employed as a service helper whose job included driving cars on public roads to be fueled, as well as delivering parts and transporting customers to and from work. (PX 30, 33; Tr. 272, 276). The service helper's driving on public roads occurred on a daily basis. (PX 30; Tr. 272).

One minor was employed by Winner Lincoln-Mercury, Inc. (Winner), between December 1, 1991 and November 30, 1993. (PX 34, 37, 38). This employee's job title was lot person and his duties included preparing cars for customers, cleaning the service department and mowing the dealership lawn. (PX 34, 36, 38). He also would drive off the lot on public roads to pick up tires and to fuel cars with this driving occurring anywhere from once to twice a day to twice per week. (PX 35, 38; Tr. 292). Winner employed about 37 persons during this time period and for the years 1991 and 1992 had annual gross sales in the neighborhood of \$12,000,000. It is located in Everett, Washington. (PX 34).

Art Gamblin Motors, Inc. (Gamblin) is an automobile dealership doing business in Enumclaw, Washington. It had about 50 employees during the times pertinent to this case and had gross sales ranging from \$17,000,000 in 1991 to over \$23,000,000 in 1992. (PX 39). Gamblin employed five minors between December 1, 1991 and November 30, 1993, who worked as lot attendants. (PX 43). The lot attendants' duties involved washing and preparing cars for display and sale, but part of their duties involved driving vehicles on public roads for delivery, dealer trades and picking up customers. (PX 40, 43; Tr. 98, 106). This driving occurred at least once per day. (PX 40). One of these lot attendants was 16 years of age at the time he was driving Gamblin's vehicles on public roads. (PX 39, 43).

Fifty-four persons were employed by Bellingham Chrysler Center, Inc. (Bellingham) during the times pertinent to this case. Bellingham had annual gross sales in excess of \$16,000,000 in 1991 and 1992. It employed seven minors, four of whom were involved in driving on public roads for the corporation between December 1, 1991 and November 30, 1993. (PX 48). Three of the minors were classified as wash persons and shuttle drivers during this time period and two of the employees were 16 years of age at the time they were involved in driving on the public roads. This job involved driving cars, cleaning the lot and shuttling the customers on the public roads on a regular basis. (PX 45, 48; Tr. 214-218). Another minor, who also was 16 years of age at the time of his driving, was employed as a wash person and utility mechanic. (PX 44, 45, 48). This employee's duties included washing and working on vehicles as well as picking up and delivering customers to and from work on a regular basis. (Tr. 214, 236-237). This dealership is located in Bellingham, Washington. (PX 45).

Good Chevrolet, Inc. (Good) only employed two minors between December 1, 1991 and November 30, 1993, who were involved in driving its vehicles on public roads. (PX 49, 53). These two, a detailer and car jockey, drove cars on public roads several times a week to a gas station, and also drove cars around the block from the service area to the showroom. The way this dealership was arranged, it was impossible to drive from the front of the dealership to the back without driving on a public road. (Tr. 118, 120). Their job duties involved washing cars, cleaning the dealership premises, and miscellaneous jobs including janitorial and painting work. (PX 50, 53). In addition to the other driving, the detailer would drive cars for dealer trades and to the paint shop. He also drove pick-up trucks on the public roads to the location where bumpers and bed liners were installed. (PX 50). The car jockey drove the shuttle van to pick-up and drop-off customers. (PX 50). Good's dealership is located in Renton, Washington. It

employed almost 100 persons during the time pertinent to this case and had annual gross sales in excess of \$30,000,000 in 1991 and 1992. (PX 49).

The duties of only one of the five minors employed by Capitol Management & Investment Co. (Capitol) involved driving company owned vehicles on public roads. (PX 55, 58). This minor was employed as a lot person to clean cars and to drive them to and from a local gas station on a daily basis. (PX 54, 55). This automobile dealership, doing business as Capitol Coachman, is located in Olympia, Washington and had gross sales of \$16,507,662.00 in 1991 and \$20,189,780.00 in 1992. (PX 55).

Evergreen Sportscars, Inc., doing business as Everett Mazda, (Everett), is a Mazda and Hyundai dealership located in Everett, Washington. It maintained about 30 employees during the times pertinent to this case and had gross dollar sales in 1991 of a little over \$13,000,000 and in excess of \$11,000,000 in 1992. (PX 59). This company employed two minors as lot attendants between December 1, 1991 and November 30, 1993. (PX 59, 63). The job duties of these minors was to wash cars and do miscellaneous maintenance. (PX 63). However, they drove vehicles off Everett's lot onto public roads on a daily basis to gasoline stations and on various errands. (PX 60, 63; Tr. 293).

Three minors were employed by Brewer Chrysler Plymouth, Inc. (Brewer) between December 1, 1991 and November 30, 1993. These three minors were classified as lot attendants which, as usual, involved cleaning cars and preparing cars for delivery. However, the lot attendants drove the cars across the street to a gasoline station and on public roads for parts runs and to transport customers, etc. (PX 64, 65, 68). Brewer is an automobile dealership located at Auburn, Washington and had gross sales in excess of \$16,000,000 in 1991 and over \$18,000,000 in 1992. It had almost 50 employees during the times pertinent to this case. (PX 64).

Jim Fugate Ford, Inc. (Fugate) is a Ford, Mercury and Mazda dealership doing business in Enumclaw, Washington. This corporation had approximately 70 employees during the times pertinent to this case and had annual gross sales of about \$26,000,000 in both 1991 and 1992. (PX 69). Fugate employed 13 minors between December 1, 1991 and November 30, 1993. (PX 69, 73). Seven of these minors were classified as detailers and were involved in driving Fugate's vehicles on public roads as a part of their jobs. (PX 69, 70-73). The work duties of these minors included washing, detailing and preparing cars for delivery, but they would also drive the vehicles on public roads to a gas station on a daily basis and drive customers to and from work once or twice per week. (PX 70, 73).

Between October 1, 1991 and September 30, 1993, Evered Motors, Inc. (Evered) had four lot attendants who drove vehicles on public roads as a part of their jobs. (PX 74, 78). Two of these minors were 16 years of age at the time they drove Evered's vehicles on public roads. (PX 74, 78). These minors' jobs involved washing cars and cleaning Evered's facilities but they also would drive the company's cars on public roads on a daily basis to a gasoline station and to and from customers' homes. (PX 74, 75; Tr. 294, 295). Evered employed about 60 persons

during the times pertinent to this case and was doing business as Bellevue Lincoln Mercury Sterling in Bellevue, Washington. Its gross sales for the years 1991 and 1992 were in excess of \$18,000,000. (PX 74-78).

Fifty-four persons were employed by Jackl, Inc. (Jackl) at its Honda dealership at Kirkland, Washington during the times pertinent to this case. Its gross sales for the year 1992 was \$11,503,064.00. (PX 79). Jackl employed a 16 year old minor between December 1, 1991 and November 30, 1993, who drove on public roads one to two times per week to a local gasoline station or for other errands. (PX 80, 83). Another minor worked as a service lot attendant for Jackl which involved driving the dealership's cars on public roads two to three times per day for dealer trades, moving cars to other lots and fueling the vehicles. (PX 80; Tr. 298).

Prestige Ford (Prestige) is an automobile dealership also located in Bellevue, Washington. It had gross sales of about \$3,000,000 in 1991 and \$4,000,000 in 1992. Prestige employed in excess of 90 employees during the times pertinent to this case. (PX 84). Six of the minors employed by Prestige between October 1, 1991 and September 30, 1993 were lot attendants. (PX 84, 86; Tr. 301). Besides washing and preparing cars for delivery and cleaning the service department, these minors drove on public roads to deliver cars, fuel cars and transport customers. (PX 88). This driving occurred at least once per week but some drove on public roads at least on a daily basis. (PX 85; Tr. 301-302). One of these minors was 16 years of age when she was drove Prestige's vehicles on public roads. (PX 84, 85, 88).

About 150 persons were employed by Thomason Auto Group North (Thomason) during the times involved in this case. This company operates a Ford and Toyota dealership in Kirkland, Washington. (PX 89, 91). Thomason had gross sales in excess of about \$71,000,000 in 1991 and \$82,000,000 in 1992. (PX 89). It employed six minors between October 1, 1991 and November 30, 1993 who were involved in driving the company's vehicles on public roads. (PX 89, 93). One of these minors worked as a service porter and drove once per day to a gasoline station and to shuttle customers. This employee was 16 years of age at the time. (PX 90, 93; Tr. 300). Another minor was a car washer who would drive at least once or twice per day on public roads to pick-up cars or to go to other lots or the body shop. (PX 90; Tr. 310). A third minor was employed as a parts runner who regularly drove on public roads to pick-up parts for Thomason. (PX 90; Tr. 317). The remaining three minors worked as lot attendants, one of whom was 16 years of age at the time of her driving. (PX 89, 93). One of these minors drove Thomason's vehicles off the lot on a regular basis to get gasoline or for other errands. (PX 90). The other two minors also drove the company's vehicles on the public roads as part of their lot attendant duties. (PX 90; Tr. 308, 309).

Pioneer Ford, Inc. (Pioneer) is located in Lynden, Washington. This company employed 26 persons during the times pertinent to this case, five of whom were minors. (PX 94). One of these minors was first employed as a lot person when she was 16 years of age and her duties involved driving on public roads to a local gasoline station, to pick-up parts and to drive customers to and from home or work. (PX 95, 98; Tr. 221). This driving occurred approxi-

mately twice per week. (PX 95, 98; Tr. 221-222). Pioneer had gross sales of approximately \$6,000,000 in 1991 and about \$7,500,000 in the following year. (PX 94).

Only one minor, age 16 years, was employed by Grey Chevrolet, Inc. (Grey) during the pertinent time of this matter. (PX 99, 103). This employee was hired to wash and prepare the cars as well as to clean the dealership premises. The minor was also expected to drive cars on public roads to gas stations and to transport customers. This occurred two to three times per week. (PX 100, 103). This auto dealership is located in Port Orchard, Washington and had gross sales of about \$13,000,000 in 1991 and almost \$15,000,000 in 1992. (PX 99).

Sound Ford, Inc. (Sound) is a large automobile dealership located in Renton, Washington which employed 195 persons during the times pertinent to this case. It had gross sales of about \$64,000,000 in 1991 and almost \$59,000,000 in 1992. Sound identified 34 of its employees as minors, 16 of whom were involved in driving the company's vehicles on public roads. (PX 104, 108). Four of these employees were 16 years of age at the time of their driving. (PX 107, 108). All of these minors washed and prepared the cars and cleaned the dealership, but they also spent five to ten percent of their time driving off the dealership premises. (PX 108). This driving included several trips each week to a gasoline station and licensing bureau, as well as trips picking up food for the sales staff, errands for management, customer and employee transportation, picking up cars from other lots, picking up documents and checks, parts runs and providing battery service to customers. (PX 105, 108).

Five minors were employed by S & K Motors, Inc. (S & K) between January 1, 1992 and December 31, 1993, who drove on public roads for the company. (PX 113, 114). S & K operates an automobile dealership also in Renton, Washington under the name of Sound Mazda, Hyundai and Suzuki. This business had approximately 50 employees during the times pertinent to this case. It had gross sales in excess of \$14,500,000 in 1991 and approximately \$14,000,000 in 1992. (PX 109). Three of the minors worked as lot men, and their duties principally involved driving cars to gasoline stations or from the back lot to the front lot which involved driving on public roads. They also drove to make parts runs or other errands. One of these lot men subsequently moved to a sales position which involved driving customers on public roads for demonstration purposes. The fourth minor was employed as a porter which involved driving on public roads to obtain parts, run miscellaneous errands and to transport customers. The fifth minor was employed as a detailer whose driving involved moving cars between dealerships. (PX 110). One of these minors was 16 years of age during the time he was involved in driving on public roads for S & K. (PX 110-113).

Seven Motors Corporation (7 Motors) employed 58 persons during the times pertinent to this case, one of whom was involved in driving the corporation's cars on public roads. (PX 114, 116, 118). This minor was employed as a lot attendant whose duties involved washing and preparing cars, cleaning the dealership and other miscellaneous duties which were described in part as moving vehicles between 7 Motors' various lots. (PX 115, 118). This driving occurred on a regular basis. (PX 115). Seven Motors operates Subaru, Peugeot and Mitsubishi dealerships

at various locations in Renton, Washington. Its gross sales were over \$21,000,000 in 1991 and 1992. (PX 114).

In the fall of 1993, a compliance officer of the Wage and Hour Division, U.S. Department of Labor, Seattle, Washington, was assigned to conduct a preliminary survey of the automobile dealership industry in the western area of the State of Washington. (Tr. 67, 148, 202-203, 254-255). The purpose of the survey was to ascertain the degree to which that industry was complying with the child labor provisions of the Fair Labor Standards Act. Based on the information obtained from some of the dealerships through the randomly mailed surveys, she concluded there were a number of potential child labor violations within that industry, most prevalently relating to minors driving dealership-owned vehicles on public roads. (Tr. 255-256). Therefore, a group of six compliance officers was assigned to further investigate some of the automobile dealerships in that geographical area regarding compliance with the child labor provisions of the Act. (Tr. 66, 203).

The group of compliance officers attempted to focus on as many car dealers as possible within their geographical area. (Tr. 203-204, 256). The group broke the area to be investigated into six smaller geographical areas and each compliance officer was to investigate about 20 dealerships in the area to which they were assigned. (Tr. 69, 204-205, 256-257). Each investigator then randomly selected the dealerships within their geographical area from the telephone book. (Tr. 204-205, 257).

Although the investigative styles of these compliance officers varied to some degree, generally each investigator initially mailed questionnaires to each selected dealership, informing the dealers that a child labor compliance investigation was being conducted for varying periods between October 1, 1991 and November 30, 1993. Each dealership was asked to provide basic information regarding their company such as types and locations of businesses, year in which the business started, annual gross sales between 1990 and 1992 and the names of corporate officers. More specific information was requested regarding the employment of minors under the age of 18 years, such as their names, addresses, social security numbers, telephone numbers, dates of birth and dates of employment. The dealers were also requested to provide proof of age and photocopies of timecards for any minors under the age of 16 years, as well as copies of work permits and any injury reports for the minors. The dealers were also asked to provide a list of lot attendants who had valid driver's licenses. (PX 4, 9, 14, 19, 24, 29, 34, 39, 44, 49, 54, 59, 64, 69, 74, 79, 84, 89, 94, 99, 104, 109, 114; Tr. 69-70, 89, 148; ALJX 65).

The results of the questionnaires next were reviewed by the compliance officers to identify potential child labor violations, particularly those relating to the minors driving employer-owned vehicles on public roads.⁴ (Tr. 70, 90-92, 149, 172, 210, 258-259, 306-307). The investigators then began the tedious task of contacting the minors by telephone to obtain more information

⁴ Only that portion of the compliance officers' investigations pertaining to these driving-related violations is addressed in this decision because only these violations remain at issue.

about their job responsibilities. (Tr. 71, 73, 149, 259; ALJX 65 at ¶ 2). In some cases, the investigators were unable to reach a minor, but did interview a parent or co-worker who had knowledge of the minor's job duties. Some investigators also contacted personnel of the dealerships such as service, inventory or office managers to obtain information about the job duties of the minors who were involved in driving vehicles on public roads. (Tr. 87-88, 238-239, 312; ALJX 65 at ¶ 3; PX 20, 30, 59, 60, 79, 80, 85, 90, 109). The investigators' interviews focused on the job responsibilities of the minors, whether the minors drove on public roads as a part of their jobs, the destinations and the frequency of the driving. (Tr. 71-76, 150, 162-63, 211-12, 219, 231, 233, 259-62, 312). The compliance officers did not consider driving on public roads only once or twice by a minor to constitute a child labor violation. (Tr. 56, 124, 233).

Once the compliance officers determined from the information obtained through their investigations that certain dealerships were in violation of the child labor restriction relating to minors driving dealer-owned vehicles on public roads, they prepared a Child Labor Civil Money Penalty Report (Form WH-266) pertaining to each dealer. (Tr. 26, 56, 79). This Department of Labor form report, which apparently was created by National Office personnel of that agency to assist compliance officers, provides step-by-step procedures for computing the pertinent penalties. (Tr. 55-58, 79-80; *see* PX 6 for example of form). The initial part of the form provides that civil money penalties are to be recommended if any one of the following factors are present:

- (1) child labor compliance was not assured;
- (2) child labor violations were recurring;
- (3) employer knowledge of child labor was documented;
- (4) any hazardous order violation or employment under legal age occurred;
- (5) serious injury, disability or death occurred; and,
- (6) more than one minor was involved.

For purposes of the cases involved in this proceeding, the compliance officers determined that factor (4) was present for all 23 dealers and that factor (6) related to all but 7 dealers. (PX 6, 16, 21, 31, 41, 46, 51, 61, 66, 71, 76, 81, 86, 91, 96, 106, 111). I reiterate that Tacoma, North Seattle, Winner, Capitol, Grey and 7 Motors only had one minor each who was involved in driving dealer-owned vehicles on public roads. (PX 11, 26, 36, 56, 101, 116).

The second part of the child labor civil money penalty report lists various violations for which civil money penalties can be assessed with the chart setting forth minimum amounts to be considered. For purposes of the cases involved in this proceeding, this form recommends a minimum penalty of \$1,000 for a violation involving a 17 year old minor driving on public roads and \$1,200 for a 16 year old minor driving on public roads. The chart and associated instructions

also provide that the minimum penalties for each violation should be multiplied by the number of violations and then multiplied by a factor of 1.5 if employer acknowledgment of child labor is documented, which is not applicable to this case. Also not pertinent to this case, the instructions go on to provide in the second part of the form for the multiplying of the child labor violations by a factor of 2.0 if any of the following factors are present: child labor injunctions; falsification/concealment of child labor; recurring child labor violations; or, failure to assure child labor compliance. The third part of the civil money penalty report also contains instructions for reducing the civil money penalties by a certain percentage if an employer has fewer than 100 employees, but such reductions do not apply to these cases because these reductions only relate to child labor recordkeeping and hours violations. It is also noted in this section of the report that the maximum civil money penalties may not exceed \$10,000 per minor. (*See* PX 6 for example of form). The compliance officers involved in this proceeding were required to use the civil money penalty report in computing the penalties against the dealerships if they determined that a child labor violation occurred. (Tr. 26, 61-62, 145-46).

The compliance officer assigned to investigate the dealerships in the south section of the Puget Sound area assessed civil money penalties for driving violations against four of the dealerships involved in this proceeding. For the period December 1, 1991 through November 30, 1993, he assessed civil money penalties against Cornforth, Capitol and Grey in the amounts of \$4,000, \$1,000 and \$1,200, respectively. Cornforth's and Capitol's violations involved 17 year old minors driving on public roads at the penalty rate of \$1,000 for each violation. Grey's driving-related penalty was \$1,200 because the minor was 16 years of age. This compliance officer also assessed a \$1,000 civil money penalty against Tacoma for one driving violation by a 17 year old minor between December 1, 1993 and January 1, 1994. The notices of administrative determination were issued to each of these dealers on March 18, 1994 and the orders of reference relating to Cornforth, Tacoma and Capitol were filed on September 7, 1994. The order of reference for Grey was filed on September 26, 1994. (ALJX 1, 3, 17, 27).

Another compliance officer investigated nine of the dealerships involved in this proceeding. Based on the notices of administrative determination, orders of reference and amended orders of reference, the following civil money penalty assessments by this compliance officer remain at issue:

<u>Company</u>	<u>Time Period</u>	<u>Civil Money Penalties (Age of Minor)</u>	<u>No. of Minors</u>	<u>Total Civil Money Penalties</u>
BNS	10/1/91-9/30/93	\$1,000.00 (17 yrs.)	2	\$2,000.00
North Seattle	10/1/91-9/30/93	\$1,000.00 (17 yrs.)	1	\$1,000.00
Totem-Hill	10/1/91-9/30/93	\$1,200.00 (16 yrs.) \$1,000.00 (17 yrs.)	1 5	\$1,200.00 \$5,000.00

<u>Company</u>	<u>Time Period</u>	<u>Civil Money Penalties (Age of Minor)</u>	<u>No. of Minors</u>	<u>Total Civil Money Penalties</u>
Winner	12/1/91-11/30/93	\$1,200.00 (16 yrs.)	1	\$1,200.00
Evergreen	12/1/91-11/30/93	\$1,000.00 (17 yrs.)	2	\$2,000.00
Evered	10/1/91-9/30/93	\$1,200.00 (16 yrs.)	2	\$2,400.00
		\$1,000.00 (17 yrs.)	2	\$2,000.00
Jackl	12/1/91-11/30/93	\$1,200.00 (16 yrs.)	1	\$1,200.00
		\$1,000.00 (17 yrs.)	1	\$1,000.00
Prestige	10/1/91-9/30/93	\$1,200.00 (16 yrs.)	1	\$1,200.00
		\$1,000.00 (17 yrs.)	5	\$5,000.00
Thomason	10/1/91-9/30/93	\$1,200.00 (16 yrs.)	2	\$2,400.00
		\$1,000.00 (17 yrs.)	4	\$4,000.00

The notice of administration determination was issued to each of these dealers on March 18, 1994 and the orders of reference were filed in each case on September 7, 1994. The orders of reference for Thomason, Evergreen and Jackl were amended on September 23, 1994. (ALJX 4, 5, 6, 7, 12, 15, 16, 17, 18).

The compliance officer, who also was the regional coordinator for the investigations, handled the investigation for the northern section of the Puget Sound area. Two of the dealers that she investigated are involved in this proceeding. She assessed a \$1,200 civil money penalty against Pioneer for one driving violation by a 16 year old minor. She assessed civil money penalties against Bellingham totalling \$4,600 for four driving violations. One of these violations, for which Bellingham was assessed \$1,000, was by a 17 year old and the three other driving violations were by 16 year old minors, for which the company was assessed penalties at the rate of \$1,200 each. The investigation period pertaining to these companies was December 1, 1991 through November 30, 1993. The notices of determination were issued to these dealers on March 18, 1994 and the orders of reference were filed on September 7, 1994. The order of reference issued to Pioneer was amended on September 26, 1994. (ALJX 9, 19).

A fourth compliance officer was assigned to investigate the dealerships in the southeastern section of the Puget Sound area within King County. Eight of the twenty-six dealerships surveyed by this compliance officer are involved in this proceeding. This compliance officer assessed the following penalties against these dealers:

<u>Company</u>	<u>Time Period</u>	<u>Civil Money Penalties (Age of Minor)</u>	<u>No. of Minors</u>	<u>Total Civil Money Penalties</u>
Bowen	12/1/91-11/30/93	\$1,200.00 (16 yrs.)	3	\$ 3,600.00
		\$1,000.00 (17 yrs.)	5	\$ 5,000.00
Gamblin	12/1/91-11/30/93	\$1,200.00 (16 yrs.)	1	\$ 1,200.00
		\$1,000.00 (17 yrs.)	4	\$ 4,000.00
Good	12/1/91-11/30/93	\$1,000.00 (17 yrs.)	2	\$ 2,000.00
Brewer	12/1/91-11/30/93	\$1,000.00 (17 yrs.)	3	\$ 3,000.00
Fugate	12/1/91-11/30/93	\$1,200.00 (16 yrs.)	4	\$ 4,800.00
		\$1,000.00 (17 yrs.)	3	\$ 3,000.00
Sound	12/1/91-11/30/93	\$1,200.00 (16 yrs.)	4	\$ 4,800.00
		\$1,000.00 (17 yrs.)	12	\$12,000.00
S & K	1/1/92-12/31/93	\$1,200.00 (16 yrs.)	1	\$ 1,200.00
		\$1,000.00 (17 yrs.)	4	\$ 4,000.00
7 Motors	12/1/91-11/30/93	\$1,000.00 (17 yrs.)	1	\$ 1,000.00

The notices of administrative determination for all of these dealers but Gamblin were issued on March 18, 1994. The notice was issued to Gamblin on April 7, 1994. (ALJX 14). The orders of reference were filed on September 7, 1994 with respect to Bowen, Gamblin, Fugate, Good and Brewer. The order of reference relating to Fugate was amended on September 23, 1994. The orders of reference regarding Sound, S & K and 7 Motors were filed on November 9, 1995. (ALJX 3, 8, 10, 13, 14, 21, 22, 23).

All but one of the respondents totally cooperated with the compliance officers. Art Gamblin Motors delayed in returning the questionnaire to the compliance officer investigating that company, then did not provide the telephone numbers of the minors. (PX 39; Tr. 95). The investigator was forced to mail questionnaires to the dealers' employees to obtain additional information, but only one of the fourteen minors employed by Gamblin returned a questionnaire. (Tr. 95, 97-98; PX 40). When the compliance officer did obtain the telephone number for a minor employed by Gamblin, the child's parents normally would refuse to let the compliance officer speak to the minor. (Tr. 97, 103). Where the compliance officer was successful in speaking with a few of the minors, Gamblin's chief executive called the compliance officer to complain about harassing these employees. (Tr. 99, 105).

As a result of the assessments of civil money penalties, the respondents terminated the employment of minors under 18 years of age who were involved in driving dealer-owned cars on public roads. (ALJX 65, ¶ 7). This was done on the advice of the Washington State Auto Dealers Association that minors should only drive dealer-owned vehicles on public roads in emergency situations. (Tr. 330-31, 337, 351-52; RX 11).

CONCLUSIONS OF LAW

Child Labor Violations

In order to protect the safety, health, and well-being of youthful workers, the Fair Labor Standards Act forbids the employment of minors in certain occupations the Secretary of Labor has found to be hazardous, as well as restricts the hours and times when minors may work. 12 U.S.C. §§ 203(l), 212(c); 29 C.F.R. § 570.52. One of the occupations the Secretary has found to be hazardous to minors under the age of eighteen is driving on the public roads. 29 C.F.R. § 570.52(a) [Hazardous Order 2]. However, there is an exception to this finding, allowing sixteen and seventeen year old minors to drive vehicles weighing under six thousand pounds and

driving is restricted to daylight hours; provided, such operation is only occasional and incidental to the minor's employment; that the minor holds a State license valid for the type of driving involved in the job performed and has completed a State approved driver education course; and provided further, that the vehicle is equipped with a seat belt or similar restraining device for the driver and for each helper, and the employer has instructed each minor that such belts or other devices must be used.

29 C.F.R. § 570.52(b)(1). A "driver" is "any individual who, in the course of employment, drives a motor vehicle at any time." 29 C.F.R. § 570.52(c)(2). "Incidental" and "occasional" are not defined in either the Act or the regulations.

The first question presented is whether a violation of the hazardous order forbidding driving exists. The Department of Labor has the burden of proof on this issue. *See* 5 U.S.C. § 556(d). While the traditional burden of proof in administrative proceedings is proof by a preponderance of the evidence, at the same time the Fair Labor Standards Act must be liberally construed because it is remedial in nature. *Sea Island Broadcasting Corp. v. FCC*, 627 F.2d 240 (D.C. Cir. 1980), *cert. denied*, 449 U.S. 834 (1980); *Lenroot v. Western Union Telephone Co.*, 52 F. Supp. 142 (S.D.N.Y. 1943), *aff'd*, 141 F.2d 400 (2nd Cir. 1944), *rev'd on other grounds*, 323 U.S. 490 (1945). The evidence in this case clearly shows the minors involved in this proceeding were under eighteen years of age and drove motor vehicles on a public road as part of their employment with the respondents. This factual burden is met by the respondents' answers to the plaintiff's interrogatories. These answers were offered in evidence by the respondents in lieu of testimony from the employees of the dealerships. Thus, I initially conclude that the respondents are in violation of the hazardous order involved in this proceeding.

The question next becomes whether the driving fell into the exception. It is the burden of the employers to show this plainly and unmistakably by a preponderance of the evidence. *Echaveste v. Blackhawk State Bank*, 93-CLA-82 @ 3 (Sec'y Nov. 20, 1995);⁵ *Worthington v. Icicle Seafoods, Inc.*, 774 F.2d 349, 352 (9th Cir. 1984), *vacated on other grounds*, 475 U.S. 709 (1986). The exception, like all exceptions to the Fair Labor Standards Act, must be narrowly construed. *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960); *Worthington*, 749 F.2d at 1409.

As a preliminary matter, I note that the two minors who drove during non-daylight hours, even once, cannot and do not fall under the exception. Thus, the employers of these minors, Tacoma Dodge and BNS Enterprises, are liable as they violated the Act. However, the vast majority of these cases do not involve non-daylight driving. In addition, plaintiff accepts that the requirements regarding the vehicle weight limit, driver's license, driver training, and seat belt conditions were all met. Post-Hearing Brief of the Plaintiff at p. 5-6. Thus, these cases revolve around whether the driving by the minors was incidental and occasional, the remaining elements of the exception.

To fall under the exception, the driving must be *both* occasional *and* incidental. As I noted previously, neither the Act nor the regulations defines either of these terms. Furthermore, there is a dearth of case law on the subject. The Department of Labor has used several definitions. In a 1985 letter to Senator Trent Lott, the department defined this as generally "limited to emergency-type situations or those which happen at rare intervals," not driving which is regular and routine. (PX 2). In 1995, the Wage and Hour Administrator issued a memo to the regional administrators intended to give a more quantifiable reading to the test. (PX 3). However, that memo is irrelevant to this case, as it was issued after the investigation at issue in these proceedings. *Blackhawk*, 93-CLA-82 @ 4.

I could find but two administrative law judge decisions defining "incidental". The earliest, *Usery v. Tooele City Corp.*, 23 Wage & Hour Cas. (BNA) [hereinafter WH Cases] 116, 76-CL-115 (ALJ Jan. 21, 1977), defined "incidental" as "the primary duty of the minor must be other than driving and that such driving as may be involved must be minor, of secondary importance, and subordinate to the primary duty." 23 WH Cases at 119. The minors in that case were hired to maintain a city's parks, and had to drive city-owned pick-up trucks daily or three to four times per week to pick up trash or supplies. *Id.* at 117. The court found the driving was secondary and subordinate to the minors' primary duty, involved only a very small percentage of their working time, and the minors spent the great majority of their working time maintaining parks. *Id.* at 119. Therefore the court decided the driving was incidental. *Id.*

⁵ Citations to administrative decisions, except those cited to two sources, are to the official copy of the decision located on-line in the Office of Administrative Law Judges law library, which can be accessed through the Internet at <http://www.oalj.dol.gov/library>.

Almost twenty years later, a different administrative law judge defined incidental as “a minor part of the overall job.” *Reich v. Delon Olds Co.*, 94-CLA-59 @ 5 (ALJ Mar. 4, 1996). He also rejected the primary/secondary distinction. *Id.* @ 5. This was a car dealership case, in which the minors were employed as lot boys or courtesy drivers. *Id.* @ 4-5. The judge noted that the driving of the courtesy van was a secondary duty of the lot boys, but one they were required to perform, and thus not incidental. *Id.* @ 5.⁶

While the employers in this proceeding put a great deal of weight on the primary/secondary distinction employed by the *Usery* court, I find myself in agreement with the *Delon Olds* decision in which the judge found that to be a distinction without a difference. If a task must be performed in order for the minor to complete his job, that task is an essential element of the job. An essential element is not incidental. Whether it is labeled as a “primary duty,” a “secondary duty,” or a “job task” is irrelevant. The label means nothing, it is the relationship between the element and the overall job that controls. Thus, if the minor must drive on the public roads in order to perform his job, then driving is an essential element of the minor’s duties, and not incidental to them. This is compatible with the plaintiff’s definition, to which I must give deference. *Sudomir v. McMahon*, 767 F.2d 1456, 1458 (9th Cir. 1985).

In these cases, I have found that the minors were required to drive on the public roads in order to perform their jobs. Each employer required this as a part of the job, and therefore it was essential to the job. This definition also complies with the mandate that exceptions to the Fair Labor Standards Act be narrowly construed. While in some cases the employer could have redefined the minors’ roles and not required this type of driving, the fact remains the employers did not do so. Thus, the minors could not complete their job duties without driving on public roads, whether driving to the gas station, driving to the parts store, or driving a courtesy car to drop off customers. It was an anticipated portion of the job. Thus, the driving was essential to the job, and not incidental to it.

I also find it interesting that the representative of the Washington State Auto Dealers Association acknowledged at the hearing that it would be difficult to employ a lot attendant without having the employee drive on public roads. (Tr. 344). Obviously, it would be impossible to employ courtesy drivers or service parts runners who could not drive on the public roads. Moreover, the dealers terminated the employment of all of their minor lot employees after receiving the child labor citations because they did not feel the minors could do the job without such driving. Apparently, the dealers did not see driving on the public roads as incidental, but rather as essential. Therefore, I find the respondents have failed to meet their burden of proving that the driving was incidental, and that the hazardous order exception applies to them.

⁶ I did find four other cases involving the incidental and occasional exception. However, in those cases, whether the driving was “incidental” was either not at issue because of a stipulation, was not defined by the administrative law judge, or was not needed for the decision. *U.S. Dept. of Labor v. Gonzales*, 93-CLA-36 (ALJ May 2, 1995); *Reich v. Canadian Lakes Development Co.*, 92-CLA-69 (ALJ May 9, 1995); *Echaveste v. Blackhawk State Bank*, 93-CLA-82 (Sec’y Nov. 20, 1995); *U.S. Dept. of Labor v. Bludau*, 94-CLA-58 (Mar. 12, 1996).

Even if I found the driving to be incidental, the evidence does not convince me that it was occasional. As noted in the *Blackhawk* decision, occasional is measured on a workweek-by-workweek basis. 93-CLA-82 @ 3-4. Moreover, the court noted in *Usery*, “[t]he amount of time involved is far less important than the frequency.” *Usery*, 23 WH Cases at 119. The judge went on to note in the *Usery* decision that driving which regularly recurs is not occasional. *Id.* at 119-20. In this proceeding, the driving regularly recurred, as it occurred at least once per week, and more often took place more frequently than that. *See also Delon Olds*, 94-CLA-59 @ 5 (regular driving of courtesy cars not “occasional”). It was not an occasional or random occurrence. Thus, it does not fall within the “incidental” and “occasional” exception to the hazardous order, and so the minors’ driving was not exempt from the order.⁷

In summary, I find that the minors involved in these cases engaged in driving on the public roads, which is forbidden by the Act. Moreover, the driving engaged in by the minors was neither incidental nor occasional, much less both incidental and occasional. Therefore, the exception to the hazardous order does not apply, and the respondents are in violation of the Act. However, there are still several points that need to be addressed.

Respondents’ counsel argues in his brief that much of the evidence in this proceeding is hearsay and thus should not be used to show violations of the Act. Specifically, he refers to the compliance officers’ use of their notes to testify at the hearing, as well as the admission in evidence of their notes and interview statements, citing 29 C.F.R. § 580.7(b). By way of explanation, the plaintiff chose to present her case through such evidence rather than attempt to locate and present the testimony of the numerous minors involved in these cases.

As correctly argued by plaintiff’s counsel, the type of evidence at issue was contemplated in promulgating 29 C.F.R. § 580.7(b). That section specifically permits the testimony of the compliance officers despite the hearsay nature of such testimony. Furthermore, the admissibility of such testimony, as well as the questioned documentary evidence, clearly is supported by other authority. 29 C.F.R. §§ 18.612, 18.803(a)(5), (6), (8), (24), 29 C.F.R. § 580.7(b); *see, also, e.g., Echaveste v. Henderson*, 91-CLA-83 (Sec’y Apr. 18, 1995); *M & C Lazzinnaro*, 88-WAB-08 @

⁷ Respondents enlisted the services of an expert in an attempt to show that “occasional” is a term of art in the labor industry, supposedly meaning an occupation would involve this sort of work up to one third of the time. (Tr. 189). I found his testimony to be of no assistance. The expert’s rationale was based on a Department of Labor publication designed to help interpret entries in the Dictionary of Occupational Titles. (Tr. 189). To define how often a person employed in a certain profession might spend on one particular task, the creators of the Dictionary divided an employee’s time into four large categories: never, up to one-third of the time, one-third of the time to two-thirds of the time, and two-thirds of the time or more. (Tr. 188). These categories were then labeled “not present”, “occasional”, “frequent”, and “constant”. (Tr. 188). However, it is clear that these are merely broad labels adopted for convenience. Just as a task performed two-thirds of the time is not being performed constantly, nor is a task being performed one-third of the time occasional. Nothing in the expert’s testimony led me to believe that these terms are terms of art in general industry. At most, they might possibly be terms of art in the expert’s industry of job placement services. However, these cases were not about job placement, and the parties involved, from the Wage and Hour investigators to the dealers, would have no reason or need to know of or apply these definitions in their industries.

4 (WAB Mar. 11, 1991); *Saunders v. American Shamrock Bldg. Maintenance*, 92-WAB-31 @ 6 (WAB May 27, 1993).

I should also reiterate that I found the plaintiff met her burden of proof based solely on the respondents' answers to the plaintiff's interrogatories. Thus, the evidence questioned by the respondents was not even needed by the plaintiff in making her case. Rather, the questioned evidence relates to the respondents' burden of proving that the driving by the minors met the exception to the hazardous order in that it was both incidental and occasional. The evidence offered by the plaintiff regarding the extent of the minors' driving obviously is not as specific as a trier-of-fact would prefer, but it is the best evidence in the record. The respondents' answers to the interrogatories regarding the extent of such driving are essentially identical, vague and self-serving. I should finally note that while respondents' counsel was critical of the evidence in the record relating to his clients' burden of proving the questioned driving was incidental and occasional, nothing precluded him from presenting the testimony from employees of the respondents instead of relying on the answers to the interrogatories. I therefore reject the respondents' objections to the plaintiff's evidence and find that without such evidence, there would be nothing credible in the record relating to the questions of whether the minors' driving was incidental and occasional.

Respondents' counsel argued extensively in his clients' brief regarding the findings of the compliance officers. However, most of the arguments are related to the quality of the supporting evidence. Again, I reject these arguments because the respondents have the burden of proving the driving by the minors was incidental and occasional. I again acknowledge that some of this evidence obviously is unclear but there is no other evidence in the record supporting the respondents' burden of proof on these matters. I therefore see no reason to discuss any of the arguments advanced by respondents' counsel regarding the specific respondents other than the timeliness issue raised with respect to Thomason Auto Group. He argued in this regard that the evidence supported that three of the violations were not within the two year statutory period. The investigator indeed acknowledged that perhaps one of these violations was more than two years old. (Tr. 308-309). However, my review of the evidence leads me to the conclusion that all of the violations occurred within the two year period covered by the investigation, October 1, 1991 through September 30, 1993. (PX 89-94). Moreover, counsel has not cited any authority in support of his position that some of the violations are barred by the statute of limitations. Therefore, I reject the arguments advanced with respect to the determinations made with regard to the Thomason Auto Group.

Respondents next claim that they did not have fair notice of the Department's definition of "incidental" and "occasional" and therefore they should not be liable for violating the regulations. They cite the case of *General Electric Co. v. U.S. Env'tl. Protection Agency*, 53 F.3d 1324 (D.C. Cir. 1995), in which the Federal Court of Appeals for the District of Columbia Circuit found the EPA had not given adequate notice of its interpretation of a complex environmental regulation. The issue in that case centered around whether distillation of a solvent used to remove toxic PCBs from electrical transformers equated with disposal of the solvent. *Id.*

The differences between the *General Electric* situation and the one at hand are significant. For one, the regulation at issue in the *General Electric* case comprises almost seven full pages in the Code of Federal Regulations which “on their face . . . reveal no rule or combination of rules providing fair notice that they prohibit pre-disposal processes such as distillation.” *Id.* at 1330; 40 C.F.R. § 761.60. In fact, the regulation did not even mention distillation, and “a person of good faith would not reasonably expect distillation -- a process which did not and was not intended to prevent the ultimate destruction of PCBs -- to be barred as an unapproved means of ‘disposal.’ ” *Id.* at 1331. The court found that although the EPA’s interpretation was permissible, “it was so far from a reasonable person’s understanding of the regulations that they could not have fairly informed GE of the agency’s perspective.” *Id.*

In contrast, the pertinent regulation in this proceeding, 29 C.F.R. § 570.52, comprises a page and a half, much of which deals with a school bus driver exception. It clearly bans driving on public roads by minors but, as discussed above, provides an exception to this ban. 29 C.F.R. § 570.52. Unlike in the GE case, the forbidden action is not hidden in some tricky, unrevealed, over expansive definition of a key term. “Driving” is clearly banned, and “incidental” and “occasional”, although not defined in the regulations, by their general meaning indicate a very limited exception. Thus, respondents did have notice from the face of the regulation that the general rule forbade driving, and that the exception was limited. Thus, *General Electric* hinders, rather than helps, respondents’ cause, as that case requires only that respondents received, or should have received, notice of the agency’s interpretation by reading the regulation. *Id.* at 1329. If a person of good faith could make the same interpretation as the agency, then the regulation provides sufficient notice. As I have found that the regulation did provide such notice, I find respondents should have had sufficient notice that the driving they allowed the minors to engage in was prohibited.

Civil Money Penalties

A civil money penalty may be assessed against an employer for a child labor violation under Section 12 of the Act and the regulations promulgated thereunder. A violation can result in a penalty assessment amounting to as much as \$10,000 for each minor employee who was the subject of a violation under Section 12 of the Act. 29 C.F.R. §§ 579.5(a), 579.9.

In determining the amount of a civil money penalty for a child labor violation, the statute requires consideration of the appropriateness of such penalty to the size of the business of the person charged and the gravity of the violation or violations. 29 U.S.C. § 216(e). The pertinent regulations under Section 12 of the Act initially repeat the specific considerations set forth in the statute. 29 C.F.R. § 579.5(a). The regulations go on to also require consideration of additional factors. 29 C.F.R. § 579.5(b)-(d).

To determine the citation amount, the investigators used a Child Labor Civil Money Penalty Report (Form WH-266) to compute the recommended penalties against the respondents. The respondents argue that the proposed assessments did not properly take into account the mitigating factors set forth in 29 C.F.R. § 579.5. Specifically, the respondents contend that by

relying on a form to calculate the proposed penalties the compliance officers clearly failed to consider all the relevant factors. However, the Administrative Review Board — which exercises the Secretary's power of review in these cases — has already rejected this argument. *Administrator v. Thirsty's Inc.*, 94-CLA-65 (ARB May 14, 1997).

The compliance officers' recommendations of penalties are entitled to respect. However, the regulations require the final determination of the penalty be made in a proceeding after an opportunity for hearing under the Administrative Procedures Act, which in turn requires a decision by the independent officer conducting the hearing. 29 C.F.R. § 579.5(f); 5 U.S.C. § 554. Thus, it is my responsibility to decide whether the penalties recommended by the compliance officers and approved by their supervisor are appropriate in light of the evidence presented to me and the factors set forth in Section 579.5.

Section 579.5(b) requires the consideration of additional factors regarding the size of the business of the person charged with a child labor violation. These factors include (1) the number of persons employed by the person charged; (2) the volume of sales or business; (3) the amount of capital investment and financial resources; and, (4) other information relative to the size of the business.

It is true that the compliance officers gave little consideration to the factors set forth in Section 579.5(b) in calculating the penalties involved in this case. They did inquire as to the dealer's volume of sales, but this did not enter into their calculation of the penalty. It is obvious, however, that the instructions set forth in that form give no recognition to the financial factors set forth in Section 579.5(b). Also, it is obvious that the compliance officers had no discretion because they were required to follow the instructions as set forth in the penalty report.

The only Section 579.5(b) factor considered by the compliance officers, or required to be considered by the instructions set forth on the form, pertains to the number of employees of the dealer. Even this factor was of no benefit to the respondents. The compliance officers were instructed by the form to consider the number of the dealers' employees in deciding whether to reduce the penalties but only if the violations involved such things as record keeping, improper hours and other factors unrelated to the financial aspects of the dealers, not hazardous order violations such as those in these cases. (Tr. 25). There is little evidence in the record outside the gross sales pertaining to investment by its shareholders or partners, and financial resources of the respondents. Neither side chose to inquire into these matters.

I reiterate that I must consider the appropriateness of the civil money penalties. I must do this in light of the factors set forth in Section 579.5, despite the compliance officers' failure to consider all of these factors. The fact that the respondents are able to pay the penalties does not automatically negate my consideration of the financial factors relating to the dealers. However, the respondents were in the best position to present such financial information for my consideration and they have not done so. Thus, I cannot conclude from the evidence before me that the

financial matters regarding the respondents support or detract from the appropriateness of the civil money penalties recommended by the plaintiff.

I repeat that the compliance officers did consider, to some extent, the number of the dealers' employees in calculating the civil money penalties. However, they did not reduce the penalties based on this factor because their investigation disclosed violations of a hazardous order. I agree that the proposed penalties are not inappropriate in view of the number of employees of the respondents. It appears that many, if not all, the dealers had employed minors in the past, and were of sufficient size to be knowledgeable of the child labor requirements.

Section 579.5(c) sets forth additional factors to consider in connection with the appropriateness of the penalties to the gravity of the violations. These factors include consideration of: (1) any history of prior violations; (2) evidence of willfulness or failure to take reasonable precautions to avoid violations; (3) the number of minors illegally employed; (4) the age of the minors, as well as records regarding age; (5) the occupations of the minors; (6) exposure to hazards and any resulting injury; (7) duration of illegal employment; and (8) the hours of day in which the employment occurred and whether such employment was during or outside school hours.

The respondents argue that the offenses involved in this case were not of severe gravity and that the violations were not willful. I believe that the compliance officers took this factor into consideration. For instance, the recommended penalties are nowhere near the maximum amounts allowed by the statute. The form utilized by the compliance officers also requires consideration of additional Section 579.5(c) factors in that varying amounts of penalties are recommended based on the ages of the employees, the hazardous nature of the occupations, and the working hours both during and outside school hours. Also, the history of prior violations and employer knowledge are considered in using the form since the instructions require increasing the initially recommended penalties by an appropriate multiple if such factors are documented. Thus, I believe that the compliance officers did consider many of the factors set forth in Section 579.5(c) in recommending the penalties at issue in these cases.

Section 579.5(d) provides that, where appropriate, consideration shall also be given to whether penalties are necessary to achieve the objectives of the Act. This section goes on to provide in this connection that consideration shall be given as to whether: (1) the violations are "de minimis"; (2) there is no previous history of child labor violation; (3) the employers' assurance of future compliance is credible; and, (4) exposure to obvious hazards was inadvertent rather than intentional. These factors relate to the degree of willfulness involved in the violations.

First, I find that the "de minimis" aspect is considered to some extent in this case because the investigators testified that no penalties were recommended unless the violations by a specific minor occurred more than once or twice. De minimis is defined as "very small or trifling matters" for which "the law does not care for or take notice of." Black's Law Dictionary, 388 (6th Ed. 1990); *Echaveste v. Horizon Publishers and Distributors*, 90-CLA-29 @ 7 (Sec'y May 11, 1994), *aff'd on recon.* July 21, 1994. Respondents would have me rule that all the violations here

were de minimis, as the minors were frequently only on the road for short periods. However, when these short distances are aggregated throughout the employment of the minors, the distances are no longer short. Furthermore, it is not the distance traveled that creates the danger to the minors, but rather the fact of travel at all. I note that oft-cited piece of conventional wisdom that most automobile accidents take place within five miles of home, which clearly does not occur because of the small distance involved, but because of the frequency with which that area is driven. The facts in this case demonstrate that this is not a situation involving “de minimis” violations.

Some of the additional factors set forth in Section 579.5(d) obviously were considered by the compliance officers. Indeed, the form utilized by them in computing the penalties requires consideration as to whether compliance was not assured, violations were recurring and whether there were any hazardous order violations. However, the extent to which these factors were considered is not obvious from the form. I do note that the form utilized by the compliance officers does take into consideration evidence of willfulness or failure to take reasonable precautions to avoid violations. It requires a fifty percent increase in the calculated penalty if the employer had knowledge of child labor laws.

It is also evident that the compliance officers considered the ages of the minors involved in the case. The form utilized to calculate the penalties provides varying amounts based on the ages of the minors as well as penalties for recordkeeping violations regarding age. It is also true that the number of minors illegally employed was considered by the compliance officers since the form which they utilized to calculate the penalties provides for a multiple based on the number of violations or minors involved in the violations.

To reiterate some of my conclusions to this point, there is no question that the compliance officers considered most of the factors set forth in subsections (c) and (d) of Section 579.5. What remains to be decided is whether their recommendations are appropriate in light of their failure to consider some of the factors set forth in Section 579.5(b). It is important to remember, however, that the statute allows for a penalty of as much as \$10,000 for each minor involved in a violation. Thus, the compliance officers technically could have recommended penalties of as much as \$890,000 for the violations.

I find that the investigators, through use of the form report, did take into account many of the factors required by the regulations. Those that they did not take into account, I conclude, do not affect my decision. I see no reason to depart from the penalties levied by the investigators, as these seem reasonable under the circumstances, and are sufficient to accomplish their purpose of punishing violators of the child labor laws and encouraging future compliance with those laws. While it may seem to some of the respondents that the violations are trivial, it would take but one serious automobile accident for all concerned parties to realize the importance of enforcing the hazardous order involved in these cases. Therefore, I uphold the civil money penalties as assessed by the compliance officers. Individual penalties for each respondent will be addressed in separate orders.

CONCLUSION

In conclusion, I find the respondents violated the Act by allowing the minors to drive dealer-owned vehicles on public roads and that such driving does not fall within the “incidental” and “occasional” driving exception. I also find that the penalties assessed by the compliance officers are appropriate. The specific amount owed by each respondent is addressed in separate orders.

DONALD W. MOSSER
Administrative Law Judge

NOTICE OF APPEAL RIGHTS. Pursuant to 29 C.F.R. § 580.13, any party dissatisfied with this Decision and Order may appeal it to the Administrative Review Board within 30 days of the date of this decision, by filing a notice of appeal with the Administrative Review Board, U.S. Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, N.W., Washington, D.C. 20210. The Administrative Review Board has been delegated authority and assigned responsibility by the Secretary to issue final decisions in Fair Labor Standards Act cases. 61 Fed. Reg. 19978 (1996). A copy of the notice of appeal must be served on all parties to this Decision and Order and on the Chief Administrative Law Judge, U.S. Department of Labor, 800 K Street, N.W., Suite 400, Washington, D.C. 20001-8002. If no timely appeal is filed, this Decision and Order shall be deemed the final agency action.